90-1119

Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1990

ROLAND A. LEBLANC,

*Petitioner,*

v.

RAYTHEON COMPANY, INC. and UNITED STATES OF AMERICA,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the False Claims Act after the 1986 Amendments bars former Federal employees from bringing qui tam actions under that Act based upon knowledge obtained in the course of their Federal employment.

2. Whether it is a prerequisite to bringing a qui tam action under the False Claims Act as amended in 1986 that the plaintiff-relator qualify as an "original source" within the meaning of 31 U.S.C. § 3730 (e)(4).

3. Whether a former Federal employee is barred from qualifying as an "original source" whenever his qui tam complaint is based on information learned in the course of his government employment, or whenever his government employment responsibilities included uncovering fraud.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals has not yet been reported. It is attached as Appendix A to this Petition. The memorandum decision issued by the United States District Court for the District of Massachusetts (Tauro, J.) dismissing petitioner's complaint is reported at 729 F. Supp. 170 (D. Mass. 1990), and is attached as Appendix C.

## JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on September 4, 1990. *See* Appendix A. A timely petition for rehearing was denied on October 16, 1990. *See* Appendix B. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The District Court's jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1355 and 31 U.S.C. §§ 3730(b)(1) and 3732(a).

## STATUTORY PROVISIONS INVOLVED

The False Claims Act, 31 U.S.C. § 3730(b)(1), provides in relevant part that:

> A person may bring a civil action for a violation of section 3729 for the person and for the United States Government.

The False Claims Act, 31 U.S.C. § 3730(e), provides that:

Certain actions barred. –

(1) No court shall have jurisdiction over an action brought by a former or present member of the

armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in section 201(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

## STATEMENT OF THE CASE

This case involves the meaning of the 1986 Amendments to the qui tam provisions of the False Claims Act. The fundamental question presented by this case is whether the Congress succeeded or failed in its expressed purpose through the 1986 Amendments to broaden greatly the ability of persons with knowledge of government contractor fraud – and in particular government employees, among the persons most likely to have relevant knowledge – to maintain qui tam actions.

On October 21, 1988, Roland A. LeBlanc ("LeBlanc"), a former Federal employee, filed a qui tam action on behalf of the United States against Raytheon Company, Inc. ("Raytheon"), to recover damages and civil penalties pursuant to the False Claims Act, 31 U.S.C. § 3729 *et seq.* LeBlanc alleged that in the course of his employment as a Quality Assurance Specialist with the Defense Contract Administrative Service ("DCAS") stationed at Raytheon's production facility in Waltham, Massachusetts (the "Waltham plant"), he observed Raytheon employees fraudulently violate the terms of various Raytheon government contracts.

LeBlanc was employed by DCAS as a Quality Assurance Specialist from November 1986 until slightly less than one year later, when he was involuntarily terminated. LeBlanc's principal responsibility was to monitor the quality of certain work performed for the United States Department of Defense by Raytheon at the Waltham plant.

Raytheon was under contract with the Department of Defense and the United States Government to furnish

equipment for use in various military and communications applications and projects. As a condition of its contracts with the Department of Defense and the United States Government, Raytheon was required to maintain its production equipment, to orient and supervise its personnel, to implement quality control programs and to maintain accurate performance and inspection records for the Department of Defense and the United States Government in conformance with various standards, guidelines, and specifications.

While stationed at the Waltham plant, LeBlanc observed Raytheon employees violate the terms of Raytheon's government contracts by, among other things, falsifying reports, failing to repair non-conforming products, failing to assure accuracy of test equipment, and fraudulently failing to comply with contract terms.

LeBlanc immediately reported this information to his superiors at DCAS. In response to LeBlanc's reports, DCAS made some efforts to attempt to prevent future contract breaches by Raytheon. DCAS also terminated LeBlanc after eleven months of employment.

When he realized that Raytheon was not being held accountable for its fraud on the government, LeBlanc on October 21, 1988, filed the qui tam action which is the subject of this petition. In accordance with 31 U.S.C. § 3730(b)(2), the action was filed under seal and service made upon the United States but not upon Raytheon.

On April 21, 1989, the United States filed notice of its intent not to enter its appearance. In its Declination of Appearance, the United States purported to reserve the right to object to LeBlanc's right under 31 U.S.C.

§ 3730(d) to collect a percentage of any proceeds recovered from his prosecution of the lawsuit. As grounds for its reservation, the United States asserted that former government employees such as LeBlanc are ineligible to recover a percentage of the proceeds of a successful qui tam action.

On July 14, 1989, LeBlanc filed a Motion to Strike United States' Reservation of Rights to Object to Plaintiff-Relator's Right to Recover a Percentage of the Proceeds from the Prosecution of this Action, arguing that 31 U.S.C. § 3730 clearly permits former government employees to institute qui tam actions and to receive a percentage of any proceeds recovered.

On July 27, 1989, the United States responded to LeBlanc's Motion to Strike United States' Reservation of Rights arguing, for the first time, that former government employees are jurisdictionally barred from bringing qui tam actions based on information acquired during their employment with the Government.

On February 6, 1990, the District Court (Tauro, J.) dismissed LeBlanc's qui tam action on the ground that qui tam actions brought by former government employees based on knowledge acquired during their government employment are jurisdictionally barred by § 3730(e)(4) of the False Claims Act, 31 U.S.C. § 3729 *et seq. United States ex rel. LeBlanc v. Raytheon*, 729 F. Supp. 170 (D. Mass. 1990). In so ruling, the District Court first held that a "public disclosure" within the meaning of 31 U.S.C. § 3730(e)(4) "necessarily occurs whenever a government employee uses government information he learned on the job to file a *qui tam* suit in his private

capacity." *Id.* at 175, App. at A21. The District Court then determined that a former government employee like LeBlanc could never qualify for the "original source" exception to § 3730(e)(4)'s jurisdictional bar. *Id.*[1]

The Appeals Court affirmed the dismissal of LeBlanc's qui tam action. The Appeals Court rejected the District Court's ruling that a qui tam suit brought by a government employee based on information learned during his employment was necessarily based on a "public disclosure," and held that LeBlanc's complaint was not based on a "public disclosure." The Appeals Court nevertheless continued its inquiry and sought to determine whether or not LeBlanc was an "original source" within the meaning of 31 U.S.C. § 3730(e)(4). Noting that "[i]t was LeBlanc's responsibility, a condition of his employment, to uncover fraud," and stating that "[t]he fruits of his [LeBlanc's] efforts belong to his employer – the government," the Court held that LeBlanc was not an "original source" and therefore his Complaint was jurisdictionally barred. App. at A7-8.

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[1] The "public disclosure" and "original source" language in 31 U.S.C. § 3730 was created by the 1986 Amendments to the False Claims Act. The sole limitation on individuals eligible to bring qui tam actions in the pre-1986 version of 31 U.S.C. § 3730 was in subsection (b)(4), which provided that courts have no jurisdiction over qui tam actions "based on evidence or information the Government had when the action was brought." *See* former 31 U.S.C. § 3730(b)(4). In 1986, Congress amended the statute to eliminate this language.

## REASONS FOR GRANTING THE WRIT

### I. WHETHER THE FALSE CLAIMS ACT NOW PERMITS FORMER FEDERAL EMPLOYEES TO MAINTAIN QUI TAM ACTIONS IS AN IMPORTANT ISSUE ON WHICH THE LOWER COURTS ARE DIVIDED AND CONFUSED.

#### A. The 1986 Amendments Were Expressly Intended to Broaden Qui Tam Jurisdiction in Order to Increase Qui Tam Actions.

Adopted in 1863 and significantly amended in 1943 and 1986, the False Claims Act is the Government's primary civil litigative tool for combatting fraud perpetrated against it. S. Rep. No. 99-345, 99th Cong., 2d Sess. 3, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5268.

As adopted during the Civil War, the Act clearly contemplated private enforcement. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), where this Court upheld a broad construction of the then qui tam provisions.

In 1943, the Congress passed amendments which had the practical effect of eliminating most qui tam suits. However, in 1986, realizing that "several restrictive court interpretations of the act have emerged which tend to thwart the effectiveness of the statute," and that "[e]vidence of fraud in Government programs and procurement is on a steady rise . . . " and "most . . . goes undetected," Congress extensively amended the Act, this time to broaden its sweep. S. Rep. No. 99-345, 99th Cong., 2d Sess. 2, 4, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5267, 5269.

The 1986 Amendments were intended to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government," and to "make the statute a more useful tool against fraud in modern times" by "encourag[ing] more private enforcement suits" and by *"correcting restrictive interpretations of . . . qui tam jurisdiction." Id.* at 5266, 5269, 5288-89 (emphasis added).

The legislative history shows that the Congress strongly felt the need to increase detection and deterrence of government fraud. The Senate Report states:

> fraud is perhaps so pervasive and, therefore, costly to the Government due to a lack of deterrence. [The Government Accounting Office] concluded in its 1981 study that most fraud goes undetected due to the failure of Governmental agencies to effectively ensure accountability on the part of program recipients and Government contractors. The study states:
>
> > For those who are caught committing fraud, the chances of being prosecuted and eventually going to jail are slim . . . The sad truth is that crime against the Government often *does* pay.
>
> S. Rep. No. 99-345, 99th Cong., 2d Sess. 3, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5268 (quoting GAO Report to Congress, *Fraud in Government Programs: How Extensive is it? How Can it be Controlled?* [1981]).

The Senate Report notes that "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity." *Id.* at 5269. Congress also identified an unwillingness among such "close

observers" to expose illegalities, citing a Merit Systems Protection Board Report indicating that 69 percent of Federal employees failed to report fraud, generally for fear of reprisal or in the belief that nothing would be done. *Id.* at 4-5, 1986 U.S. Code Cong. & Admin. News at 5269-70.

### B. The Lower Federal Courts are Divided on the Three Jurisdictional Questions Presented Concerning Construction of the False Claims Act as Amended.

The 1986 Amendments clearly began to serve their intended function. Before the Amendments were passed, the Justice Department received notice of approximately six qui tam complaints a year. *See* Abramowitz, *Mutiny on the Bounty – Qui Tam: Bonanza or Fair Reward*, 83 N.Y.L.J. 3 (May 1, 1990). In the first ten months of 1989, by contrast, the Department received notice of the filing of 100 such complaints in District Courts throughout the nation. For further evidence of the positive effects of the 1986 Amendments on the volume of qui tam litigation, see France, *The Private War On Pentagon Fraud*, 76 A.B.A.J. 46-49 (March 1990).

This rapid growth of qui tam litigation resulted in strong objections on jurisdictional grounds, yielding disparate and contradictory interpretations of the 1986 Amendments, and especially their jurisdictional provisions, by the lower Federal courts. The lawsuits and the jurisdictional decisions have produced extensive

commentary in the legal press, reflecting the current confusion over jurisdictional questions.[2]

All three questions presented by this petition arise out of the 1986 Amendments and all three have resulted in contradictory decisions below.

### 1. Whether the False Claims Act as Amended in 1986 Bars Federal Employees from Bringing Qui Tam Actions.

From 1943 until the 1986 Amendments, there was no question but that Federal employees were ineligible to bring qui tam actions under the False Claims Act. *United States ex rel. McCans v. Armour & Co.*, 146 F. Supp. 546 (D.D.C. 1956), *aff'd*, 254 F.2d 90, *cert. denied*, 358 U.S. 834 (1958).

Since the 1986 Amendments took effect, District Courts in two circuits have held that the Amendments removed this bar, so that Federal employees may bring

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[2] See, *e.g.*, Shirk, Greenberg and Dawson, *Truth or Consequences: Expanding Civil and Criminal Liability for the Defective Pricing of Government Contracts*, 37 Cath. U.L. Rev. 935 (1988); *Conflict Between Voluntary Disclosure, Employee Rights Still Unresolved*, 50 Fed. Con. Rep. (BNA) No. 19, at 823 (Nov. 14, 1988); Graham, *The Qui Tam Amendments: Privatizing the Civil Prosecution Function*, 49 Fed. Con. Rep. (BNA) No. 14, at 659 (Apr. 4, 1988); Victorino, Ivey and Sullivan, *"Qui Tam" Lawsuits*, Briefing Papers No. 89-10, Sept. 1989 (Fed'l Pub. Inc.); Vogel, *Citizens' Lawsuits Based on the False Claims Act Have Multiplied*, 13 Nat'l L.J. 20 (Nov. 26, 1990); Abramowitz, *Mutiny on the Bounty – Qui Tam: Bonanza or Fair Reward*, 83 N.Y.L.J. 3 (May 1, 1990); Bozanich, *Medical Group to Pay $355,000 to Medicare*, L.A. Times, Apr. 29, 1988, at 36, col. 1.

such actions even where the information on which the action is based was acquired during their Federal employment. *Erickson ex rel. United States v. American Inst. of Biological Sciences*, 716 F. Supp. 908, 914-15 (E.D. Va. 1989). *United States v. CAC-Ramsey, Inc.*, 744 F. Supp. 1158, 1159-61 (S.D. Fla. 1990).

The District Court in the case at bar flatly disagreed, holding all such Federal employee qui tam suits to be barred by the Act. *United States ex rel. LeBlanc v. Raytheon*, 729 F. Supp. 170, 175-77 (D. Mass. 1990), App. at A19-26.

The First Circuit seems to have taken a somewhat intermediate position, not supported by any statutory language, stating that not all suits are barred but only those brought by former Federal employees, such as LeBlanc, whose employment responsibilities included uncovering such fraud. App. at A7-8.

Accordingly, the lower Federal Courts have already taken at least three different positions on this important question of Federal statutory construction.

**2. Whether it Is a Prerequisite to Bringing All Qui Tam Actions that the Plaintiff-Relator be an "Original Source."**

In the case at bar, the First Circuit clearly held that a qui tam plaintiff must be an "original source" within the meaning of 31 U.S.C. § 3730(e)(4)(B) of the information on which the suit was based, regardless of whether there had been a prior "public disclosure" of that information within the meaning of 31 U.S.C. § 3730(e)(4)(A). (App. at A7-8). A similar "original source" prerequisite for bringing a qui tam action was imposed in *United States v.*

*Rockwell Int'l Corp.*, 730 F. Supp. 1031, 1035-36 (D. Colo. 1990).

In sharp contrast, at least four courts have determined that the "original source" provision is not a general jurisdictional requirement but only comes into play *after* it has first been determined that there has been a "public disclosure" of the information in question. *Houck On Behalf Of United States v. Folding Carton Admin. Comm.*, 881 F.2d 494, 504 (7th Cir. 1989), *cert. denied sub nom., Certified Plaintiff Class in MDL-250 v. Folding Canton Reserve Fund*, ___ U.S. ___, 110 S. Ct. 1471, *cert. denied sub nom., Re Will*, ___ U.S. ___, 110 S. Ct. 1514 (1990); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2nd Cir. 1990); *Erickson ex rel. United States v. American Inst. of Biological Sciences*, 716 F. Supp. 908, 914 (E.D. Va. 1989); *United States v. CAC-Ramsey, Inc.*, 744 F. Supp. 1158 (S.D. Fla. 1990).

### 3. Whether a Federal Employee Is Barred from Qualifying as an "Original Source" Whenever His Complaint Is Based on Information Learned in the Course of His Government Employment.

Both the *Erickson* and *CAC-Ramsey* decisions held that a Federal employee could be an "original source" even if the information at issue was learned during his Federal employment. 716 F. Supp. at 910-12, 914 and 744 F. Supp. at 1160-1161.

The District Court in *LeBlanc* explicitly disagreed with *Erickson* and reached a flatly opposite result. 729 F. Supp. at 175-77, App. at A19-26.

The First Circuit sought a new middle ground, apparently disqualifying only those whose specific responsibilities as government employees were "to uncover fraud." (App. at A8).

## II. THE FIRST CIRCUIT PLAINLY ERRED IN IMPOSING A REQUIREMENT THAT ALL QUI TAM PLAINTIFFS BE ORIGINAL SOURCES.

The 1986 Amendments to the False Claims Act provide that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). Nowhere in the statute is there any restriction on the term "person."

After broadly defining those persons who are eligible to bring qui tam actions, Congress limits the actions those individuals may bring only in subsection (e) of the statute. 31 U.S.C. § 3730(e) specifically sets out four classes of actions which the statute does not authorize:

(1) . . . an action brought by a former or present member of the armed forces . . . against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) . . . an action brought . . . against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought . . .

(3) . . . an action . . . based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) . . . an action . . . based upon the *public disclosure* of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, *unless* the action is brought by the Attorney General or the person bringing the action is an *original source* of the information.

(B) For purposes of this paragraph, *"original source"* means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information. [Emphasis added.]

The statutory scheme of 31 U.S.C. § 3730 is simple. Any person may bring a qui tam action unless the action is specifically barred by one of the exclusions in subsection (e). A court seeking to determine if it has jurisdiction over a qui tam complaint must first determine whether or not the complaint falls into one of the categories described in subsection (e)(1)-(4) of 31 U.S.C. § 3730. If the lawsuit does not, the court's inquiry ends and it must accept jurisdiction over the action.

It is only when a qui tam complaint falls into subsection (e)(4) – that is, the complaint is based on a defined "public disclosure" of information – that the court must continue its inquiry and determine whether or not the "original source" exception to the "public disclosure" bar applies, *i.e.*, whether or not the plaintiff is an "original source" of the information on which the complaint is based. Subsection (e)(4)(B) defines the scope of this "original source" exception, for purposes only of the (e)(4)(A) public disclosure bar. If a complaint is not based on

"public disclosure," there is no bar under subsection (e)(4) and it is irrelevant whether the plaintiff is an "original source."

Thus once the Court of Appeals determined that LeBlanc's complaint was not based on a "public disclosure" within the meaning of 31 U.S.C. § 3730(e)(4), the issue of whether LeBlanc was an "original source" was irrelevant and could not properly be used as a basis for dismissing the complaint. Put another way, the four barred categories of actions stated in § 3730(e) end with § 3730(e)(4)(A), and the exception to category 4 provided by the language beginning with "unless" has no application when, as the Court found, there was no "public disclosure" requiring an exception.

## III. THE FIRST CIRCUIT PLAINLY ERRED IN RULING THAT A FEDERAL EMPLOYEE CANNOT QUALIFY AS AN "ORIGINAL SOURCE" IF HIS QUI TAM COMPLAINT IS BASED ON INFORMATION LEARNED IN THE COURSE OF HIS GOVERNMENT EMPLOYMENT.

The Court of Appeals held that a government employee whose job responsibilities include uncovering fraud, and who learns the information on which his qui tam action was based during the course of government employment, cannot qualify as an "original source" because "the fruits of his efforts belong to his employer – the government." App. at A8. The effect of this rule is obviously to bar those most likely to acquire knowledge of the kind of conduct the False Claims Act is intended to deter. The False Claims Act defines an original source as "an individual who has direct and independent

knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action. . . . " 31 U.S.C. § 3730(e)(4)(B). A government employee whose job it is to uncover Government fraud clearly can meet the two prongs of the original source definition – direct and independent knowledge and voluntary disclosure – and LeBlanc did.

As used in the definition of an original source, independent knowledge simply means first-hand knowledge. There is nothing in the language of the False Claims Act which even hints that "the information on which the allegations are based" must "belong" to the relator. This notion of ownership is entirely alien to a statute which permits even a wrongdoer who obtains his information by participating in the fraud to bring suit and, unless convicted, share in the recovery from his own employer. 31 U.S.C. § 3730(d)(3). The legislative history makes it clear that all that is necessary is that the original source himself possess the information early enough.

> A person is an original source if he had some of the information related to the claim which he made available to the Government or the news media in advance of the false claims being publicly disclosed. This person has the right to bring an action after these disclosures are made public as long as it is filed before an action is commenced by the Government.

132 Cong. Rec. H9389 (daily ed. Oct. 7, 1986) (Statement of Congressman Berman). The concerns of the Congress with respect to the requirement of "direct and independent knowledge" were clearly to bar the parasitic lawsuit by someone who had no role in finding out about the fraud except reading a report of it. This situation is at the

other end of the spectrum from the Federal employee or contractor employee who is a direct observer of the fraud, but whom the First Circuit's rule would bar.

Many of the qui tam actions filed since the 1986 Amendments have been brought by current or former employees of government contractors.[3] These plaintiffs are well situated personally to observe contractor misconduct precisely because of their employment. If government contractors were to impose upon their employees, as a condition of their employment, an obligation to uncover fraud, then on the First Circuit's reasoning any information regarding fraud uncovered by their employees would "belong" to the contractor and these contractor employees could not then ever qualify as original sources. Thus government contractors – a primary target of the False Claims Act – could themselves, simply as a matter of contract, substantially reduce the pool of potential qui tam plaintiffs and their own potential liability. This extension of the logic in *LeBlanc* illustrates the awkward and absurd result of the First Circuit's approach, which has no warrant in the language of the statute and runs directly counter to the result that Congress intended to achieve through the 1986 Amendments. And as to Federal employees themselves, the result is equally absurd: those most likely to know the most because it is their job, are barred from bringing qui tam

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[3] *See, e.g., Gravitt ex rel. United States v. General Electric Co.*, 848 F.2d 190 (6th Cir.), *cert. denied*, 488 U.S. 901 (1988); *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084 (C.D. Ca. 1989); *United States ex rel. Butenkoff v. Industrial Tectonics, Inc.*, No. CV-86-4078 (E.D. Mich. 1986); *United States ex rel. Troung v. Northrop Corp.*, No. CV-88-967 (C.D. Ca. 1988).

actions, but other Federal employees, likely to uncover fraud only incidentally to their government employment, are not barred.

Government employees in LeBlanc's position can also meet the second prong of the "original source" test. The original source exception requires that the information on which the allegations of fraud are based be voluntarily provided to the Government. A government employee clearly can "voluntarily" provide to his employer information he does not own or control, so long as he possesses the information. In the context of "original source," "voluntarily" may refer merely to a person acting of his own free will and not under compulsion. This interpretation of the voluntary disclosure language of the statute is entirely consistent with the legislative history of the 1986 False Claims Act amendments.

In the Senate debates leading to the 1986 Amendments, Senator Grassley, the author of the bill, stated that the voluntary disclosure language was meant to:

> preclude the ability of an individual to sue under the qui tam section of the False Claims Act when his suit is based solely on public information and the individual was a source of the allegations *only because the individual was subpoenaed [sic] to come forward*. However, those persons who have been contacted or *questioned by the Government* or the news media *and cooperated by providing information* which later led to a public disclosure would be considered to have "voluntarily" informed the Government or media and therefore considered eligible qui tam relators.

132 Cong. Rec. S11,244 (daily ed. Aug. 11, 1986) (emphasis added). The construction for which petitioner contends does not require the Court to go even as far as this express legislative history would warrant.

Moreover, the legislative history of the 1986 Amendments provides clear evidence that Congress intended to deal by encouragement with the reticence of Federal employees to come forward with evidence of contractor fraud. Congress specifically noted the role of Federal employees in solving the problem the Amendments were meant to redress. As stated in the Senate Judiciary Committee report:

> In 1983, the U.S. Merit Systems Protection Board conducted a survey of approximately 5,000 Federal Government employees to determine to what extent observed fraud, waste and abuse was going unreported. The Merit Systems Board reported that 69 percent of those who believed they had direct knowledge of illegalities failed to report the information. Those employees who chose not to report fraud were then asked why they had failed to come forward. The most frequently cited reason given (53 percent) was the belief that nothing would be done to correct the activity even if reported. Fear of reprisal was the second most cited reason (37 percent) for nonreporting. S. Rep. No. 345, 99th Cong., 2d Sess. 4-5, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5269-70.

This legislative history of the voluntary disclosure provision of the statute, combined with the express purpose of the Amendments to expand the use of qui tam actions, supports the position that a government

employee is legally capable of making a voluntary disclosure of information about a false claim against the Government.

In enacting the Amendments, Congress realized that the Government "might not have the resources necessary to bring an action whenever information at its disposal was capable of forming the basis of a claim." *United States ex rel. Stinson v. Provident Life & Accident Ins. Co.*, 721 F. Supp. 1247, 1250 (S.D. Fla. 1989), referring to 132 Cong. Rec. S11,243 (daily ed. Aug. 11, 1986) (Statement of Sen. Grassley). Congress, however, was also concerned with preventing opportunistic lawsuits filed by qui tam plaintiffs who had nothing to do with developing the information. *Id.* "The 'original source doctrine' represents a compromise between these competing interests." *Id.* at 1253, citing 132 Cong. Rec. at S11,244. A qui tam action brought by a government employee who developed the information and who provided the information in his possession to the Government before filing his qui tam complaint clearly satisfies these competing concerns and meets the terms of the compromise.

There is nothing about Federal employment that inherently deprives civil servants of the requisite "independent knowledge" of fraud or prevents them from "voluntarily" conveying such information to the Government. These terms are designed to allow individuals who cooperated in conveying first-hand knowledge of fraud to act as relators. Since LeBlanc did provide such knowledge to the Government before filing his action, he is a proper relator. The District Court and the Court of Appeals decisions to the contrary go a long way to undermine the important Congressional purpose of creating

incentives for those in the best position to acquire and use knowledge of government contractor fraud to put a stop to that fraud. To leave those erroneous decisions standing would go substantially further in that wrong direction.

## CONCLUSION

The numerous qui tam cases filed since the 1986 Amendments to the False Claims Act show that those Amendments were well conceived to achieve the Congressional purpose of enlisting private plaintiffs and the private bar on the side of the government in the battle against government contractor fraud. The numerous objections to jurisdiction over such cases, and the sustaining of many of those objections, show something of the strength of the opposition to that Congressional purpose. The lower courts being so divided, only this Court can now show that those jurisdictional objections are ill-founded, and therefore only this Court can effectuate the plain legislative intent. The present case raises all the significant issues, and presents them on a clean, simple record containing nothing to prevent a clear testing and

resolution of those issues. Therefore the petition should be granted as to all three questions presented.

Respectfully submitted,

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# APPENDIX

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## APPENDIX A

UNITED STATES COURT OF APPEALS
For The First Circuit

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No. 90-1246

UNITED STATES OF AMERICA
ex rel. ROLAND A. LEBLANC,

Plaintiff-Relator, Appellant,

v.

RAYTHEON COMPANY, INC.,

Defendant, Appellee.

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APPEAL FROM THE UNITED STATES
DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro, *U.S. District Judge*]

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Before

Torruella, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
and Cyr, *Circuit Judge*.

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*James C. Heigham*, with whom *Francisca D. Morant*, *Choate, Hall & Stewart*, *Charles B. Molineaux* and *Dempsey, Bastianelli, Brown & Touhey*, were on brief for appellant.

*Michael F. Hertz*, Civil Division, U.S. Department of Justice, *Stuart M. Gerson*, Assistant Attorney General and *Wayne A. Budd*, United States Attorney, were on brief for appellee.

September 4, 1990

TORRUELLA, *Circuit Judge*. This is an appeal from an order entered by the United States District Court for the District of Massachusetts dismissing for lack of jurisdiction a *qui tam* action brought under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, by Roland A. LeBlanc (appellant) against Raytheon Company, Inc. (appellee). Although we agree with the result reached by the district court, we find its reasoning overly broad and conclusive.

## I. FACTS

Roland LeBlanc filed this lawsuit on October 21, 1988 under the False Claims Act, 31 U.S.C. §§ 3729-3733 (1988). LeBlanc's complaint alleged that, during his employment as a Quality Assurance Specialist for the United States Government Defense Contract Administrative Service ("DCAS"), he observed fraud in the handling of government contracts by the defendant Raytheon Company, Inc. ("Raytheon").

Under the False Claims Act, a *qui tam* action must first be served on the United States, rather than on a defendant. It is filed *in camera*, where it remains under seal for at least sixty days. 31 U.S.C.A. § 3730(b)(2). Within those sixty days, the government has the option to intervene and take over the prosecution of the case. *Id.* If the government chooses to intervene, it becomes the primarily responsible party, although the *qui tam* plaintiff, also known as the "relator," may still continue as a party.

31 U.S.C.A. § 3730(c)(1). If the government chooses not to intervene, the relator then has the right to proceed with the case on his own, with the hope of recovering a portion of any consequent damages and penalties. 31 U.S.C.A §§ 3730(c)(3) and (d)(2). When declining to appear, the government may reserve the right to object to the relator's right under 31 U.S.C.A. § 3730(d) to recover, if successful, a percentage of the proceeds from the prosecution of the action.

LeBlanc properly filed his suit with the government. The government ultimately chose not to intervene, but filed a reservation of the right to collect if LeBlanc should prevail. Below, LeBlanc moved to strike the government's reservation. The district court dismissed the motion, holding that it was premature in that it did not present a live case or controversy. With this we agree. Since the government has not officially objected to LeBlanc's recovery of proceeds from the proposed *qui tam* suit, the challenged conduct is only threatened, not actual. We will not decide an issue that is merely conjectural or hypothetical. *Los Angeles v. Lyons*, 461 U.S. 95, 101-2 (1982). However, the district court went on to hold that *qui tam* actions by government employees are excluded by the False Claims Act. Here, we disagree. Although we do agree that Roland LeBlanc's action is excluded, as discussed below, not all *qui tam* actions brought by government employees are excluded by the False Claims Act.

## II. DISCUSSION

From 1943 to 1986, government employees were effectively prohibited from bringing *qui tam* actions by

the False Claims Act.[1] In 1986, Congress amended the statute to "encourage more private enforcement suits." S. Rep. No. 99-345, 99th Cong., 2d Sess. 23-24, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5288-89. This case turns on the meaning of the 1986 amendments to the *qui tam*[2] provisions of the False Claims Act. Basically, Congress broadened the universe of potential plaintiffs, with only four exclusions. At issue here is whether or not government employees fall under one of those exclusions, § 3730(e)(4), and are still barred from bringing suits under the Act. The False Claims Act provides in relevant part:

> (e) Certain actions barred . . .
>
> . . . (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in

---

[1] Before its amendment in 1986, 31 U.S.C. § 3730 effectively prohibited both current and former government employees from bringing *qui tam* actions based on information acquired while a government employee. *United States ex rel. McCans v. Armour & Co.*, 146 F. Supp. 546 (D.D.C. 1956) (per curiam), *aff'd*, 254 F.2d 90, *cert. denied*, 358 U.S. 834 (1958). The pre-1986 version of 31 U.S.C § 3730(d) had provided that courts had no jurisdiction over *qui tam* actions "based on evidence or information the Government had when the action was brought."

[2] "Qui tam" comes from the Latin phrase "who brings the action for the king as well as himself." *See Erickson v. American Institute of Bio. Sciences*, 716 F. Supp. 908, 909 n.1 (E.D.Va. 1989) (citing W. Blackstone, *Commentaries on the Law of England*, 160 (1768)). By statute a *qui tam* action allows an informer to become a "private attorney general" with a portion of the recovery going to the informer and the remainder to the state.

> a congressional, administrative, or Government Accounting Office Report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C.A. § 3730(e)(4).

*Erickson, ex rel. United States v. American Institute of Bio. Sciences*, 716 F. Supp. 908 (E.D. Va. 1989), the only case to discuss the issue of whether government employees can bring *qui tam* actions after the 1986 amendments, held that the language structure, legislative history and purpose of the 1986 amendments reveal a legislative intent to permit such actions. The *Erickson* court reasoned that since § 3730(b) states that any "person may bring a civil action," and because nowhere in the statute are there restrictions on the term "persons," Congress intended that "Government employees are included in the general universe of permissible *qui tam* plaintiffs unless, in the particular circumstances, they fall into one of the four specifically excluded groups." *Id.* at 913. *Erickson* went on to hold that government employees did not fall into the exclusion of § 3730(e)(4), which is also the exclusion at issue in this case.

The district court, while agreeing with *Erickson* that the False Claims Act was specifically amended to broaden

the scope of permissible plaintiffs, concluded that government employees did indeed constitute an excluded group under § 3730(e)(4) and thus are barred from bringing *qui tam* actions. The district court found that because "government employees maintain a dual status – arms of the government while at work, private citizens while not at work – a 'public disclosure' necessarily occurs whenever a government employee uses government information he learned on the job to file a *qui tam* suit in his private capacity." Furthermore, the district court went on to conclude that all government employees are barred under the original source exception of § 3730(e)(4) as well.

The district court need not have gone so far. For this reason we take this opportunity to clarify and limit the district court's holding and analysis.

## A. PUBLIC DISCLOSURE

The district court's analysis of the "public disclosure" provision effectively erases a large portion of § 3730(3)(e)(4). We disagree with the district court's analysis for three reasons. First, the logical reading is that the subsection serves to prohibit courts from hearing *qui tam* actions based on information made available to the public during the course of a government hearing, investigation or audit or from the news media. It bars government employees, as well as private citizens, from bringing *qui tam* actions only if the information forming the basis of the action was acquired in the circumstances described in 31 U.S.C. § 3730(e)(4)(A). It does not prevent government

employees from bringing *qui tam* actions based on information acquired during the course of their employment but not as the result of a government hearing, investigation or audit or through the news media.

Second, the district court's analysis of the subsection requires the assumption that government employees lead schizophrenic lives and can publicly disclose information to themselves. Even were this hypothesis physically reasonable, it totally ignores the limiting language in § 3730(e)(4)(A) which follows the term "public disclosure." That language bars jurisdiction over actions "based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media . . . " It does not deny jurisdiction over actions based on disclosures other than those specified, contrary to what the district court seemed to maintain.

Last, the district court further assumes that the filing of a *qui tam* action is itself a "public disclosure." This cannot be. Such an action is filed under seal without service on anyone other than the United States and remains non-public until the district court enters an order lifting the seal. To hold otherwise would be to render each and every filing a "public disclosure," thus barring all *qui tam* actions.

### B. ORIGINAL SOURCE

The district court held that a government employee in the same position as LeBlanc cannot qualify for the "original source" exception to § 3730(e)(4)'s jurisdictional

bar. We agree. It was LeBlanc's responsibility, a condition of his employment, to uncover fraud. The fruits of his effort belong to his employer – the government. Thus, LeBlanc was not someone with "independent knowledge of the information" as required by the statute. This conclusion, however, does not mean that there is no government employee who could qualify to bring a *qui tam* action under the original source exception. We decline to draft a litigation manual full of scenarios that would fall under the exception. Suffice it to say that we limit our holding to the facts.

*Affirmed* in result.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 90-1246

UNITED STATES OF AMERICA,
ex. rel. ROLAND A. LeBLANC,
Plaintiff-Relator, Appellant,

v.

RAYTHEON COMPANY, INC.,
Defendant.

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Before
Torruella, *Circuit Judge*,
Bownes, *Senior Circuit Judge*, and
Cyr, *Circuit Judge*.

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ORDER OF COURT

Entered: October 16, 1990

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing,

It is ordered that the petition for rehearing is denied.

By the Court:

FRANCIS P. SCIGLIANO, CLERK.

By DANIEL F. LOUGHRY
Chief Deputy Clerk.

[cc: Messrs: Heighman, Hertz, O'Duden and Ostrach]

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## APPENDIX C

**UNITED STATES of America, ex rel.**
**Roland A. LeBLANC, Plaintiff,**

**v.**

**RAYTHEON COMPANY, INC.,**
**Defendant.**

**Civ. A. No. 88-2363-T.**

United States District Court,
D. Massachusetts.

Jan. 25, 1990.

Amended Order Feb. 6, 1990.

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James C. Heigham and James Roosevelt, Jr., Choate, Hall & Stewart, Boston, Mass., Charles Molineaux, Dempsey, Bastianelli, Brown & Touhey, Washington, D.C., for LeBlanc.

Robert L. Ashbaugh and Steven D. Aitken, U.S. Dept. of Justice, Washington, D.C., Peter Gelhaar, Asst. U.S. Atty., for U.S.

### MEMORANDUM

TAURO, District Judge.

Plaintiff, Roland LeBlanc, is a former Quality Assurance Specialist of the United States Government Defense Contract Administrative Service ("DCAS"). While so employed, he was stationed for eleven months at the Waltham, Massachusetts plant of defendant Raytheon Company, Inc. ("Raytheon"). There, LeBlanc allegedly observed several violations by Raytheon employees in their handling of government contracts. He reported

these violations to his superiors at DCAS, and appropriate actions were taken.

In October 1988, eleven months after he was terminated by DCAS, LeBlanc brought this *qui tam*[1] action in the name of the United States, pursuant to the Federal False Claims Act,[2] to recover damages and civil penalties for Raytheon's alleged frauds against the United States. Under the False Claims Act, a *qui tam* suit must first be served on the United States, rather than the defendant. It is filed *in camera*, where it remains under seal for at least sixty days. 31 U.S.C.A. § 3730(b)(2) (West Supp.1989). Within those sixty days, the government has the option to intervene and take over the prosecution of the case. *Id.* If the government chooses to intervene, it becomes the primary responsible party, although the *qui tam* plaintiff, also known as the "relator," may still continue as a party. 31 U.S.C.A. § 3730(c)(1) (West Supp.1989). If the government chooses not to intervene, the relator then has the right to proceed with the case on his own with the hope of recovering a portion of any consequent damages and penalties. 31 U.S.C.A. §§ 3730(c)(3) and (d)(2) (West Supp.1989).

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[1] "Qui tam" comes from a longer Latin phrase meaning "who brings the action for the king as well as himself." *See Erickson v. American Institute of Bio. Sciences*, 716 F.Supp. 908, 909, n. 1 (E.D.Va.1989) citing W. Blackstone, *Commentaries on the Law of England* 160 (1768). A *qui tam* action is an action brought by an informer, pursuant to a statute, where a portion of the recovery goes to the informer and the remainder goes to the state. *Id.*

[2] Title 31 U.S.C.A. § 3729 *et seq.* (West Supp. 1989).

LeBlanc properly filed his suit with the government. The government ultimately chose not to intervene. But, in its Declination of Appearance, the government reserved "the right to object to the relator's right under 31 U.S.C. § 3730(d) to recover, if successful, a percentage of the proceeds from the prosecution of this action." *United States' Notice of Declination of Appearance*, p. 2.

Presently at issue is LeBlanc's motion to strike the government's reservation of the right to object to LeBlanc's recovery of proceeds. In support of his motion, LeBlanc argues that the recent revisions to the False Claims Act authorize his recovery of proceeds, regardless of his former status as a government employee. The government opposes the motion to strike, arguing that: 1) the motion is premature, rendering any court decision here a mere advisory opinion; and 2) the False Claims Act does not authorize government employees to file *qui tam* suits based solely on information obtained in the course of government employment.

I.

The first issue to be addressed is whether this case presents a live "case or controversy" such that jurisdiction would be proper under Article III of the Constitution. *See Diamond, et al. v. Charles*, 476 U.S. 54, 61, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986) ("Article III of the Constitution limits the power of federal courts to deciding 'cases' and 'controversies.' "); *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975) (justiciable case or

controversy is a jurisdictional prerequisite). The government argues that, because it is not clear that the government will ever exercise its right to object to LeBlanc's recovery, the issue of whether LeBlanc is entitled to any proceeds is not a ripe "case" or "controversy." LeBlanc unfortunately fails to address this argument, and it is one that is ultimately dispositive.

The government has not officially objected to LeBlanc's recovery of proceeds from the proposed *qui tam* suit. It has merely reserved its right to do so. Where, as here, the challenged conduct is only threatened, "[t]he plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *Los Angeles v. Lyons*, 461 U.S. 95, 101-2, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1982). *See also, Thomas v. Union Carbide Agricultural Products, Co.*, 473 U.S. 568, 580, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985) (ripeness doctrine prevents courts from "premature adjudication" of "abstract disagreements"). The determination as to whether a threat is sufficiently immediate to warrant a finding of jurisdiction is to be made by analyzing the underlying factual circumstances.[3]

There are three critical uncertainties that permeate the situation here. First, it is not clear that LeBlanc will even proceed with the suit. Second, it is problematical as to whether he will be successful if he does proceed.

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[3] *Maryland Casualty Co. v. Pacific Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941).

Third, it is an open question as to whether the government will object to LeBlanc's recovery, should he successfully prosecute the suit. In light of these several contingencies, the possible threat of a government objection is not sufficiently real and immediate to justify this court's jurisdiction.[4]

The special circumstances of this case do not warrant a more permissive standard of ripeness analysis. Of course, the refusal of jurisdiction here may frustrate the purpose of the False Claims Act's *qui tam* provisions, which is to provide financial incentives that will encourage the exposure of frauds against the government. *See United States ex rel. LaValley v. First National Bank of Boston*, 707 F.Supp. 1351, 1355 (D.Mass.1988); S.Rep. No. 99-345, 99th Cong., 2d Sess. 3-4, *reprinted in* 1986 U.S.Code Cong. & Admin. News 5266-67. Faced with the possibility that the government might later object to his recovery of proceeds, a relator, like LeBlanc, may choose

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[4] *See Fagot v. Federal Deposit Insurance Corp.*, 584 F.Supp. 1168, 1179 (D.P.R.1984) ("[T]he alleged controversy cannot be based upon the possibility of a factual situation that may never develop."). *See also Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985) (case not ripe where claim involves "contingent future events that may not occur as anticipated, or indeed may not occur at all."); *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 81 L.Ed. 617 (1937) (courts should avoid issuing an "opinion advising what law would be upon a hypothetical state of facts."). *Cf. Eccles v. Peoples Bank*, 333 U.S. 426, 434, 68 S.Ct. 641, 92 L.Ed. 784 (1948) ("Where administrative intention is expressed but has not yet come to fruition . . . we have held that the controversy is not yet ripe for equitable intervention.").

not to chance the costs of prosecution, because there would be no guarantee of a return on his investment. By holding that a relator may not establish his right to claim *qui tam* proceeds until the government actually objects to his recovery, this court may arguably chill the incentives that the False Claims Act sought to create. But, where the requirements of ripeness are not satisfied, jurisdiction may not be presumed merely because resolution of the substantive issue might advance a worthwhile policy goal. In another context, the Eleventh Circuit has stated:

> Needless to say, the decision makers would benefit greatly by having guidance as to the potential legal ramifications of their decisions. Furnishing such guidance prior to the making of the decision, however, is the role of counsel, not of the courts.

*Hendrix v. Poonai*, 662 F.2d 719, 722 (11th Cir.1981).[5]

Finally, it can also be argued that, rather than seeking coercive relief prematurely, LeBlanc's motion is, in fact, a request for a declaration that he is authorized to proceed under the False Claims Act. "[W]hen coercive relief only is sought but is deemed ungrantable or inappropriate, the court may *sua sponte*, if it serves a useful purpose, grant instead a declaration of rights." Fed.R.Civ.P. 57 (Declaratory Judgments), advisory committee's note.

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[5] *See also*, 6A Moore's Federal Practice ¶ 57.12 (2d ed. 1989) ("[T]he requirements of justiciability are not met if the complainant merely alleges that he 'is at a loss to know what course to pursue.' ") quoting *M & M Transportation Co. v. U.S. Industries, Inc.*, 416 F.Supp. 865 (S.D.N.Y. 1976).

This argument, however, falls prey to the same problems of ripeness noted above. Declaratory relief is one of a range of remedies available to a litigant. But, an independent basis for federal court jurisdiction must be established before a litigant is entitled to declaratory relief. *See Skelly Oil v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72, 70 S.Ct. 876, 94 L.Ed. 1194 (1950); *Colonial Penn Group, Inc. v. Colonial Deposit Co.*, 834 F.2d 229, 232 (1st Cir.1987) ("Federal jurisdiction does not lie simply because relief is requested under the federal Declaratory Judgment Act").

Moreover, when a plaintiff relies on a request for declaratory relief to engage in a preemptive strike against threatened action by the declaratory defendant, the "well-pleaded complaint rule" applies. *Greenfield and Montague Transp. Area v. Donovan*, 758 F.2d 22, 26 (1st Cir.1985). The rule, in this context, requires that:

> [w]here the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened . . . action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim.

*Greenfield and Montague* at 26-7, citing *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 248, 73 S.Ct. 236, 97 L.Ed. 291 (1952).

LeBlanc's motion is, in effect, an effort to put in play his defense to the government's threat of objection to his

recovery. The government's threat, therefore, and not LeBlanc's request, must provide the basis for jurisdiction. And, as has already been noted, the government's threat depends upon the occurrence of too many contingencies to make it a live "case or controversy." Even if we cast LeBlanc's motion as a request for declaratory relief, therefore, there is no ripe controversy that would provide jurisdiction.

Accordingly, as LeBlanc's motion does not present an actual "case" or "controversy," it must be denied.

II.

Even if LeBlanc's motion does present an actual "case or controversy," his *qui tam* complaint must be dismissed. The False Claims Act bars *qui tam* suits by former government employees, based upon information they acquired in the course of their government employment.

Prior to 1986, the False Claims Act prohibited former government employees from bringing *qui tam* suits based on information acquired during the course of their government employment.[6] The False Claims Act was

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[6] The pre-1986 version of 31 U.S.C. § 3730(d) provided that courts had no jurisdiction over *qui tam* suits "based on evidence or information the Government had when the action was brought" *See* former 31 U.S.C.A. § 3730(b)(4) (West 1983). That jurisdictional bar was included in the False Claims Act in 1943, in order to stem the tide of "parasitical actions" in which relators would base their litigation on information already secured by the government in the regular course of law enforcement. *See* Letter of Attorney General Biddle, *reprinted in*

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substantially amended in 1986[7], however, and its *qui tam* provisions were revised.[8] In its present form, the False Claims Act provides, in relevant part:

> **(e) Certain actions barred . . .**
>
> . . . (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office Report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

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H.R. Rep. No. 263, 78th Cong. 1st Sess. 2 (1943). One of Congress's concerns at that time was that *qui tam* suits might induce government employees to investigate claims with an eye toward remuneration over and above that provided by their jobs. *Erickson, ex rel. United States v. American Inst. of Bio. Sciences*, 716 F.Supp. 908, 916, n. 18 (E.D.Va.1989).

[7] False Claims Amendments Act of 1986, Pub.L. No. 99-562, 100 Stat. 3153 (1986).

[8] The government concedes that the 1986 amendments came about because the jurisdictional bar was too broad. For example, the pre-1986 provisions prohibited suits by "honest informers" such as: 1) those who had independent information of fraud, which the government also happened to possess, and 2) "original sources" who gave the information to the government, but then found themselves barred by that very submission because, "at the time the suit was brought," the government possessed the information. *See United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984); *United States ex rel. LaValley v. First National Bank of Boston*, 707 F.Supp. 1351, 1355 (D.Mass. 1988).

> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C.A. § 3730(e)(4) (West Supp.1989).

Only one case, *Erickson, ex rel. United States v. American Institute of Biological Sciences*, 716 F.Supp. 908 (E.D.Va.1989), has addressed the issue of whether the 1986 amendments to the False Claims Act removed the jurisdictional bar against government employees.[9] The court in *Erickson* concluded that, although the False Claims Act, as amended, does not expressly address this question, the language, structure, legislative history, and purpose of the amendments reveal a legislative intent to permit government employees to sue under the False Claims Act. 716 F.Supp. at 918.

The court noted that the amended statute permits any "person" to sue, unless he falls into one of four specifically excluded groups.[10] It concluded that the *qui*

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[9] The government cites one other case which held, according to the government, that government employees are still barred from suing under the False Claims Act. Because that case remains under seal, however, this court cannot properly consider it.

[10] Title 31 U.S.C. § 3730(e) specifically bars the following four groups of suits: 1) suits between members of the military (§ 3730(e)(1)); 2) suits against members of Congress, the Judiciary, or senior Executive officials if the action is based on

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*tam* plaintiff there, under facts similar to the case at bar,[11] did not fall into any of the four excluded groups. *Id.* at 914. According to *Erickson*, not even § 3730(e)(4) excluded the relator, because he was the "original source" of the information. *Id.*[12]

This court agrees with the conclusion in *Erickson* that the Act was specifically amended to allow *all* persons to sue, *unless* they fall into § 3730(e)'s four excluded classes. But this court disagrees with *Erickson's* determination that government employees are not excluded under the terms of the statute.

Government employees are excluded by § 3730(e)(4) of the False Claims Act. That section prohibits suits based

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evidence or information known to the government when the action was brought (§ 3730(e)(2)); 3) suits based on allegations which are the subject of a civil suit in which the government is already a party (§ 3730(e)(3)); and 4) suits based on the public disclosure of allegations in a public proceeding, unless the person suing is the original source of the information. (§ 3730(e)(4)). *See supra* for full text of § 3730(e)(4).

[11] Erickson worked for a State Department Agency, and his job was to ensure that a private laboratory's contract with the agency was properly administered. Erickson discovered violations of the contract and reported the misconduct directly to his supervisor. When the agency for which he worked declined to pursue the matter, he filed a *qui tam* suit.

[12] The *Erickson* court drew further support from the FFCA's "whistleblower" provision, § 3730(h), in which the definition of "employer" was intended to include public as well as private entities. *Id.* at 914. The court derived from this the implication that government employees are specifically included in the class of people Congress desires to have aid in enforcement of the anti-fraud laws generally.

on the "public disclosure" of government information. 31 U.S.C.A. § 3730(e)(4) (West Supp.1989). Because government employees maintain a dual status – arms of the government while at work, private citizens while not at work – a "public disclosure" necessarily occurs whenever a government employee uses government information he learned on the job to file a *qui tam* suit in his private capacity.[13]

Moreover, a former government employee like LeBlanc cannot qualify for the "original source" exception to § 3730(e)(4)'s jurisdictional bar. An "original source" is defined in the statute as:

> . . . an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C.A. § 3730(e)(4)(B) (West Supp.1989). LeBlanc was not someone with "independent knowledge of the information." Rather, he was a government employee whose responsibility it was to uncover such information. Because gaining the information was required of him as a condition of his employment, the fruits of his effort belong to his employer – the government. For purposes of the proffered information, the government and LeBlanc were indistinguishable, as opposed to individual entities. Given his status, LeBlanc did not provide information to the government "voluntarily," under the terms of the statute. Rather, he reported the information to the

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[13] This argument was not addressed in the *Erickson* case.

government in response to the obligations of his employment.

The interpretation of § 3730(e)(4) followed here is consistent with Congressional intent.[14] The "original source doctrine" was designed to bridge Congress' competing goals of preventing opportunistic lawsuits while at the same time encouraging the disclosure of information otherwise unavailable to the government. *See U.S. ex rel. Stinson, et al. v. Provident Life & Accident Ins. Co.*, 721 F.Supp. 1247, 1250 (S.D.Fla.1989) citing 132 Cong.Rec. S11244 (daily ed. Aug. 11, 1986) (statement of Sen. Grassley).

A lawsuit by a former government employee based on information he obtained solely through his employment can fairly be construed as "opportunistic." The relator in such a context would profit from information already obtained at the taxpayers' expense. In other words, permitting former government employees to bring *qui tam* actions based upon information they discovered on the job would allow them to be paid twice for the same work. That is not what Congress had in mind.[15] *Cf.*

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[14] The ambiguity of terms of art such as "public disclosure" and "original source" requires that the terms be construed in light of the objects and policies of the statute as a whole. *See Stafford v. Briggs*, 444 U.S. 527, 535, 100 S.Ct. 774, 63 L.Ed.2d 1 (1980) (courts should look, beyond literal use of terms, to objects and policies of statute as a whole); *United States v. McGoff*, 831 F.2d 1071, 1078 (D.C.Cir.1987) ("The settled approach for interpreting [terms of art] is . . . not one emphasizing ordinary meaning.").

[15] Indeed, permitting government employees to bring such *qui tam* suits would contravene other official expressions of the

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*United States ex rel. Marcus v. Hess*, 317 U.S. 537, 560, 63 S.Ct. 379, 392, 87 L.Ed. 443 (1943) (Jackson, J., dissenting).[16]

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policy against "opportunism." For example, President Johnson issued an executive order in 1965 which provided:

> Sec. 203. Employees may not (a) have direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties as Federal employees, or (b) engage in, directly or indirectly, financial transactions as a result of, or primarily relying upon, information obtained through their employment . . .
>
> Sec. 205. An employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public.

Exec.Order No. 11222, 30 Fed.Reg. 6469 (1965), *reprinted in* 1965 U.S.Code Cong. & Admin. News 4385, and 18 U.S.C. § 201 note. Additionally, Title 18 U.S.C.A. § 208(a) (West Supp.1989) imposes criminal penalties upon any employee who "participates personally and substantially as a Government officer or employee, through . . . investigation . . . in . . . [any] particular matter in which, to his knowledge, he . . . has a financial interest. . . . " While neither of these examples is directly applicable, they serve to reinforce the government's policy against the opportunistic uses of government information.

[16] At the heart of the government's arguments is the concern that permitting government employees to sue will result in unseemly races to the courthouse between government employees and the government, and may discourage government employees from furthering investigations of fraud for fear of losing control over information on which a suit may be brought.

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A bar to suits by government employees, present or former, is consistent with the balance of goals that the "original source doctrine" sought to achieve. While Congress intended to expand the class of eligible relators, it maintained its interest in preventing parasitical suits which add nothing to the enforcement of anti-fraud laws.[17] A suit brought by a government employee based

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These same concerns were raised by Justice Jackson in his dissent in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943). In construing the original 1863 False Claims Act, the majority of the *Marcus* Court concluded that, not only did the Act permit suits by "any person," but "even a district attorney, who would presumably gain all knowledge of a fraud from his official position, might sue as the informer." 317 U.S. at 546, 63 S.Ct. at 385. Justice Jackson criticized the majority, saying:

> To accept the view . . . that today law-enforcement officials could use information gleaned in their investigations to sue as informers for their own profit, would make the law a downright vicious and corrupting one. . . . If we were to add motives of personal avarice to other prompters of official zeal the time might come when the scandals of law-enforcement would exceed the scandals of its violation.

*Id.* at 560, 63 S.Ct. at 392.

Indeed, the 1943 amendment creating a blanket exclusion for government employees was passed largely in response to the majority's conclusion in *Marcus*. *See Erickson* at 915-16; *U.S. ex rel. LaValley v. First Nat. Bank of Boston*, 707 F.Supp. 1351, 1354 (D.Mass.1988).

[17] The 1986 amendments arose largely out of the recognition that the government's own enforcement of anti-fraud laws

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on frauds discovered in the course of his employment adds nothing to the enforcement process.[18] To be consistent with Congress' intent, § 3730(e)(4) must be interpreted to ban all *qui tam* suits based on government information, unless the individual bringing the suit acquired his knowledge of the fraud in his private capacity.[19] *Qui tam* suits, such as LeBlanc's, that are based upon

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was inadequate and required the assistance of private citizens. *See United States ex rel. LaValley v. First National Bank of Boston*, 707 F.Supp. 1351, 1355 (D.Mass.1988); S.Rep. No. 99-345, 99th Cong., *reprinted in* 1986 U.S.Code Cong. & Admin. News 5267 (Congress sought to "increase incentives for *private* individuals to bring suit.") (emphasis added). The amendments still maintained the jurisdictional bar of "parasitical suits" with which the 1943 version of the Act was concerned, however. *Id.* at 1356.

[18] In the case of the private relator, the government's enforcement is enhanced, at the outset. Even though a suit *after* the private relator has disclosed the information pursuant to § 3730(e)(4) adds nothing new to the government's body of information, the initial disclosure of the information did add something. The government obtained information that it did not have before, because the individual had no prior obligation to turn over his information to the government. Conversely, at *no* point in the *qui tam* proceeding does a government employee add to the government's body of information. In his capacity as a government employee, the relator was acting as an arm of the government. When he discovered the fraud in the course of his employment, therefore, it was the *government* that discovered the fraud. His subsequent "voluntary" disclosure pursuant to § 3730(e)(4), therefore, adds nothing to what the government already knew.

[19] For example, the "original source" exception in § 3730(e)(4) contemplates a situation in which a private citizen

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information discovered in the course of government employment, therefore, are barred.

An order will issue.

AMENDED ORDER

TAURO, District Judge.

For the reasons stated in *United States of America, ex rel. Roland A. LeBlanc v. Raytheon Company, Inc.*, CA No. 88-2363-T (D.Mass. Jan. 25, 1990) (memorandum) (Tauro, J.), plaintiff-relator LeBlanc's Motion To Strike United States' Reservation Of Rights is hereby DENIED for failure to present an actual "case or controversy."

Alternatively, because this *qui tam* suit is jurisdictionally barred by § 3730(e)(4) of the Federal False Claims Act, 31 U.S.C. § 3729 *et seq.*, this action is hereby DISMISSED.

IT IS SO ORDERED.

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discovers a fraud, reports it to government authorities, and the information is somehow publicly disclosed. Notwithstanding the public disclosure, the private individual may still maintain his suit because he, as a private citizen, originally discovered the fraud.